

1 **STATE OF CALIFORNIA**
2 Department of Industrial Relations
3 Division of Labor Standards Enforcement
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8 **BEFORE THE LABOR COMMISSIONER**
9 **OF THE STATE OF CALIFORNIA**
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11 MAUREEN MCDONALD, p/k/a/
12 MOZELLA,

13 Petitioner,

14 vs.
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16 PETER TORRES, individually and dba
17 PETER TORRES MANAGEMENT,

18 Respondent.
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) CASE NO. TAC 27-04

) **DETERMINATION OF CONTROVERSY**

20 The above-captioned matter, a petition to determine controversy under Labor Code
21 §1700.44, came on regularly for hearing on March 22, 2005 in Los Angeles, California, before the
22 Labor Commissioner's undersigned hearing officer. Petitioner MAUREEN MCDONALD, p/k/a/
23 MOZELLA, (hereinafter referred to as "Petitioner"), was represented by Allen B. Grodsky of
24 Grodsky & Olecki LLP. Respondent PETER TORRES, individually and dba PETER TORRES
25 MANAGEMENT, (hereinafter referred to as "Respondent"), was represented by Gerald Weiner of
26 Probst & Weiner. Appearing as a witness for Petitioner was Jeremy Mohr.

1 Petitioner seeks a determination that the Agreement entered into by the parties on or about
2 January 1, 2003, is void and unenforceable, and that Petitioner has no liability thereunder to
3 Respondent, and Respondent has no rights or privileges thereunder.

4 Based on the evidence presented at this hearing and on the other papers on file in this matter,
5 the Labor Commissioner hereby adopts the following decision.

6 **FINDINGS OF FACT**

7 1. Sometime in the Fall of 2002, Respondent, who was working at Elektra Records as an
8 A&R Consultant, received a demo cd containing three acoustic tracks performed by Petitioner, a
9 singer songwriter. After listening to the demo cd, Respondent emailed Petitioner who was
10 backpacking through Europe, informed her that he would love to work with her, and asked her to
11 return to America. Approximately one month later, Petitioner met with Respondent at his Los
12 Angeles office where she performed several songs for him. Soon thereafter, Petitioner and
13 Respondent reached a verbal agreement wherein Respondent promised to develop Petitioner, help
14 her get a demo and eventually get her signed with Elektra Records. Over the next couple of months,
15 Respondent set up meetings with publishers and producers and eventually chose a producer to help
16 produce the demo for Petitioner. After the demo was completed, Respondent gave a copy to Elektra
17 Records. After listening to the demo, Elektra Records informed Respondent that it was not
18 interested in signing Petitioner to a record deal. Consequently, Respondent passed Petitioner's demo
19 around to different publishers and labels. During this time, Petitioner also performed for labels such
20 as Columbia, RCA and Maverick. Within a month of performing for Maverick, Petitioner was
21 offered a record deal which she accepted and signed in July 2003.

22 2. Two months after signing the record deal with Maverick, Petitioner signed a
23 management contract with Respondent which was dated "as of January 1, 2003". Petitioner stopped
24 working with Respondent in the Spring of 2004.

25 3. On August 6, 2004, Petitioner filed this Petition with the Labor Commissioner. No
26 action has been filed in superior court by either party.

1 4. Respondent testified he has never been licensed with the Labor Commissioner as a
2 Talent Agent.

3 5. During the months preceding the signing of the record deal in July 2003 and up until
4 February 2004, Petitioner performed live at various venues in the Los Angeles area. Petitioner
5 testified that she continued to perform after she signed the record deal with Maverick in order to
6 build a following, to get people to sign up on her mailing list, and to get people aware of her as an
7 artist in anticipation of her record. Live performances given by Petitioner before and after signing
8 her record deal with Maverick, which Petitioner claims were procured by Respondent, include: the
9 Hotel Café; House of Blues; Acoustic Playhouse; The Viper Room; The Mint; and Masquers
10 Cabaret.

11 **A. Hotel Café**

12 At the hearing in this matter, Petitioner argued that an email dated February 3, 2003, from
13 Respondent to Jeremy Mohr, Petitioner's attorney, asking Mr. Mohr to put Respondent in contact
14 with people at the Hotel Café in order to have Petitioner perform live, is proof that Respondent
15 attempted to book a performance for Petitioner at this venue. Respondent, on the other hand,
16 testified that while he may have asked Mr. Mohr for the phone number of the talent booker at Hotel
17 Café, he never called the talent booker, never booked a performance for Petitioner at this venue and
18 Petitioner never played at this venue while he was her manager. No evidence was offered showing
19 that Respondent ever contacted the talent booker at Hotel Café.

20 **B. House of Blues**

21 Petitioner performed live at the House of Blues Mainstage on May 4, 2003 and twice at the
22 House of Blues Foundation Room. Petitioner testified that in general, Respondent would call her up
23 and ask her if she was available to play a show on a given date and time. If Petitioner was available
24 to perform the show, Respondent would call her back and tell her she was booked for the show.
25 Petitioner testified that she never booked any of her own shows. Respondent testified that he did not
26 procure live performances for Petitioner. With respect to the first show performed at the House of
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1 Blues, Respondent testified that he was contacted by the House of Blues' promoter whose assistant
2 had seen Petitioner perform at another venue and wanted to book a live performance for Petitioner
3 at the House of Blues. As to the second and third performances at the House of Blues, Respondent
4 testified that on both occasions, he was contacted by the same promoter to book the shows and that
5 he merely passed the information on to Petitioner. On cross examination, Petitioner admitted that she
6 did not know how the shows came about but stated that the only other person involved in setting up
7 shows was Respondent. Petitioner offered as evidence of procurement of the first performance, an
8 email dated May 1, 2003 from Respondent to Mr. Mohr announcing details of the show and offering
9 to leave tickets for him at will call.

10 C. Acoustic Playhouse

11 Petitioner performed live at the Acoustic Playhouse on August 23, 2003. With regard to this
12 show, Respondent testified that Cleo Antonelli, who books shows for the Acoustic Playhouse and
13 who, according to Respondent, is very informed of the singer songwriter scene in Los Angeles,
14 heard about Petitioner and called Respondent to see if Petitioner could play a show at the Acoustic
15 Playhouse. Respondent also testified that after Petitioner played the first show at the Acoustic
16 Playhouse, Cleo booked future shows directly with Petitioner. Petitioner denied this allegation.
17 Respondent also testified that since Petitioner was not paid for any of the shows, there was nothing
18 to negotiate. The only contact Respondent had with Cleo after the show was booked, was regarding
19 the guest list for the show. Neither Petitioner nor her witness Mr. Mohr were present when this
20 show was booked but both argued that since they did not book the show, Respondent was the only
21 other person involved in Petitioner's professional team who could have booked the show. In
22 support of this argument, Petitioner offered as evidence an email from Respondent to Mr. Mohr
23 announcing the details of the show.

24 D. The Viper Room

25 Petitioner performed live at The Viper Room on September 3, 2003. Petitioner testified that
26 she did not set up this show. As with her performances at the House of Blues and the Acoustic
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1 Playhouse, Petitioner argued that since she and Mr. Mohr did not book this show, the only other
2 person that could have booked it was Respondent. Petitioner and Mr. Mohr also admitted that they
3 were not present when the show was booked and thus, did not personally witness Respondent
4 booking the show. Respondent testified that this show was booked by an independent promoter
5 who had an evening at this particular venue and was trying to showcase local talent. According to
6 Respondent, this promoter contacted him seeking to book Petitioner. It appears that the only role
7 Respondent had with respect to this show was forwarding the guest list to the promoter and
8 announcing the show to Petitioner's mailing / fan list. An email to Mr. Mohr from Respondent,
9 dated August 27, 2003, clearly indicated that this show was open to the public.¹

10 E. The Mint

11 Petitioner was set to perform live at the Mint on January 28, 2004 but the event was canceled
12 by the venue. Petitioner testified that she learned of the show's cancellation through the
13 Respondent. According to Respondent, Cleo Antonelli from the Acoustic Playhouse has a night at
14 the Mint and booked this show. As with the House of Blues, Acoustic Playhouse and The Viper
15 Room, Petitioner offered as evidence of procurement an email from Respondent to Mr. Mohr and
16 other fans, announcing the details of the show.

17 F. Masquers Cabaret

18 Petitioner performed live at Masquers Cabaret on February 26, 2003. As with the other
19 shows, Petitioner argued that she did not book this show and that it must have been booked by
20 Respondent. Likewise, Respondent argued that Cleo from the Acoustic Playhouse booked this
21 show. In an email to Angela Trudell with Mr. Mohr copied, Respondent announced the details of
22 this show and asked the email recipients to "spread the word."

23 CONCLUSIONS OF LAW

24 1. Labor Code §1700.44(c) states: "No action or proceeding shall be brought pursuant
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26 ¹The email states "Hey there, just wanted to invite you and all your friends to the next MoZella
27 show, Maverick Recording Artist MoZella, Wed ,Sept 3rd ,9pm at the Viper Room, get me a list of
names by Monday and I'll make sure they all get in for free, let me know" Peter Torres.

1 to this chapter with respect to any violation which is alleged to have occurred more than one year
2 before the commencement of the action or proceeding." Respondent has not brought an action or
3 proceeding against Petitioner. This proceeding was initiated by Petitioner with the filing of the
4 Petition on August 6, 2004. Section 1700.44, subd. (c) explicitly bars any claim for affirmative relief
5 based on a violation which occurred more than one year prior to the filing of the petition.

6 Accordingly, if a violation of the Act is found, the one year statute of limitations limits disgorgement
7 to commissions paid within one year of the filing of the Petition. The statute of limitations does not
8 limit which employment opportunities or engagements may be considered in determining whether a
9 violation of the Act has occurred since *any violation*, even one occurring more than a year from the
10 filing of the petition, would render the entire contract void ab initio and thus, preclude Respondent
11 from enforcing any future rights or privileges thereunder.

12 2. Petitioner, a singer songwriter, is an artist within the meaning of Labor Code
13 §1700.4(b).

14 3. The critical issue here is whether Respondent functioned as a "talent agency" within
15 the meaning of Labor Code §1700.4(a). Labor Code §1700.5 provides that "no person shall engage
16 in or carry on the occupation of a talent agency without first procuring a license therefor from the
17 Labor Commissioner." A "talent agency" is "a person or corporation who engages in the occupation
18 of procuring, offering, promising, or attempting to procure employment or engagements for an artist
19 or artists." Labor Code §1700.4(a).

20 4. Black's Law Dictionary, Sixth Edition, defines the term "procure" as "To initiate a
21 proceeding; to cause a thing to be done; to instigate; to contrive, bring about, effect or cause. To
22 persuade, induce, prevail upon, or cause a person to do something." No testimony or evidence was
23 provided by Petitioner to show that Respondent actually initiated, caused to be done, instigated,
24 contrived or brought about the bookings for shows at the House of Blues, the Acoustic Playhouse,
25 The Viper Room, the Mint or Masquers Cabaret. Both Petitioner and her witness Jeremy Mohr,
26 admitted in cross examination that they were not present when any of the aforementioned shows
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1 were booked. As such, they did not witness Respondent booking the shows. At best, they can only
2 assume it was him because they did not book the shows themselves. Notably absent from these
3 proceedings were any club promoters who could have resolved the conflicting testimony provided by
4 the parties. Without the testimony of any of the club promoters, the only evidence presented is based
5 on assumptions. Consequently, Petitioner has not met her burden in proving that Respondent
6 procured any of the engagements at issue.²

7 Relying on *Hall v. X Management, Inc.*, TAC No. 19-90 and *Sevano v. Artistic Productions,*
8 *Inc.* TAC 8-93, Petitioner argues that solicitation is not required to prove procurement. Thus,
9 Petitioner argues that even if there is no finding that Respondent *solicited* any of the engagements at
10 issue, his *negotiation* of the terms of said engagements, is sufficient to constitute procurement.

11 Alternatively, relying on *Kilcher v. Vainshtein*, TAC No. 02-99 and again on *Sevano, supra*,
12 Petitioner also argues that procurement of employment is not contingent on negotiations.
13 Petitioner contends that even if there is no finding of *negotiation* of the terms of any of the
14 engagements at issue, the mere act of entering into discussions with the various venues concerning
15 the performances, constitutes procurement.

16 Lastly, relying on *Kilcher, supra* at p.15, Petitioner argues that Respondent procured
17 engagements for Petitioner when he responded to the different venues' requests for Petitioner to
18 perform and accepted the negotiated terms of the engagements.

19 In contrast to the *Hall, Sevano* and *Kilcher* cases, in this case there wasn't evidence of
20 *solicitation* of an employment contract or engagement. The engagements at issue were already in
21 place by the time Respondent forwarded the guest list for the shows to the different venues.

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23 ²"The burden of proof is found at Evidence Code §115 which states, '[e]xcept as otherwise
24 provided by law, the burden of proof requires proof by preponderance of the evidence.' Further, *McCoy*
25 *v. Board of Retirement of the County of Los Angeles Employees Retirement Association* (1986) 183
26 Cal.App.3d 1044 at 1051 states, 'the party asserting the affirmative at an administrative hearing has the
27 burden of proof, including both the initial burden of going forward and the burden of persuasion by
28 preponderance of the evidence (cite omitted). 'Preponderance of the evidence' standard of proof requires
the trier of fact to believe that the existence of a fact is more probable than its nonexistence. *In re*
Michael G. 74 Cal.Rptr.2d 642, 63 Cal.App.4th 700." *Robi v. Wolf*, TAC No. 29-00 at pp.6-7, *Behr v.*
Dauer, TAC No. 21-00 at pp. 8-9.

1 Respondent did not bring about or cause the engagements to occur.

2 Moreover, no evidence was presented showing that Respondent *negotiated* anything in order
3 to procure the engagements. Petitioner was not compensated for the performances. The evidence
4 shows that the dates and times were set by the venue and not by Respondent as Petitioner contends.
5 Since it was an acoustic live performance, no details pertaining to equipment had to be negotiated.
6 No evidence was presented that the guest list had to be negotiated. Respondent merely provided the
7 guest list to the venue after the show was booked. Announcing details of the shows and inviting
8 Petitioner's mailing list to the shows also does not constitute procurement.

9 Lastly, no evidence was presented showing Respondent *accepted a negotiated instrument*.
10 Respondent testified that the venues contacted him to book Petitioner for shows and selected the
11 time and date of the performance. Petitioner testified that when contacted by Respondent to see
12 whether she was interested and available to perform at one of these shows, she would tell him yes or
13 no and then he would call her back to confirm the show was booked. Respondent would then
14 communicate the response to the venue. Respondent's communication to the venue of whether or
15 not Petitioner was interested and available to perform on the date and time set up by the venue, is
16 not considered *acceptance of a negotiated instrument* and therefore, cannot be considered
17 procurement.

18 6. In sum, no evidence was presented by Petitioner showing that Respondent solicited,
19 negotiated or accepted a negotiated instrument for any of the engagements at issue. As such, there is
20 no evidence of procurement. It follows that there is no evidence of Respondent *attempting to*
21 *procure* engagements for Petitioner. There is also no evidence that Respondent *offered* or *promised*
22 *to procure* employment or engagements for Petitioner other than securing a record deal, an activity
23 exempt from the definition of "talent agency" in Labor Code §1700.4(a).


24 CONCLUSION

25 Petitioner has failed to meet her burden in establishing that Respondent procured
26 engagements on her behalf in violation of the Talent Agency Act. The Petition is denied and the
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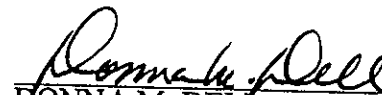
matter is dismissed.

Dated: July 8, 2005


EDNA GARCIA EARLEY
Special Hearing Officer

Adopted:

Dated: July 22, 2005


DONNA M. DELL
State Labor Commissioner

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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is DIVISION OF LABOR STANDARDS ENFORCEMENT, Department of Industrial Relations, 320 W. 4th Street, Suite 430, Los Angeles, CA 90013.

On July 26, 2005, I served the following document described as:

DETERMINATION OF CONTROVERSY

on the interested parties in this action [TAC 27-04] by placing

☐ the originals

☒ a true copy thereof enclosed in a sealed envelope addressed as follows:

Allen B. Grodsky
Mary Gin
GRODSKY & OLECKI LLP
2001 Wilshire Blvd., Suite 210
Santa Monica, CA 90403

Counsel for Petitioner

Gerald B. Weiner
Probstein & Weiner
9696 Culver Blvd., Suite 205
Culver City, CA 90232

Counsel for Respondent

☐ BY MAIL I deposited such envelope in the United States Mail at Los Angeles, California, postage prepaid.

☒ BY MAIL I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day.

☐ BY EXPRESS MAIL I am readily familiar with the firm's business practice of collection and processing of correspondence for mailing with the United States Postal Service and said correspondence is deposited with the United States Postal Service the same day.

☐ BY FACSIMILE I sent a copy of said document by fax machine for instantaneous transmittal via telephone line to the offices of the addressee(s) listed above using the following telephone number(s):

☐ BY PERSONAL SERVICE I delivered a copy of said document to the parties set forth above, as follows:

Executed on July 26, 2005, at Los Angeles, California. I declare under penalty of perjury the foregoing is true and correct.

Edna Garcia Earley